

No. 21213 ✓

See 3393

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ADOLPH WEINBERG and ETTA WEINBERG, SUGAR  
DADDY, INC., *et al.*,

*Appellants,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Appellee.*

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APPELLANTS' PETITION FOR REHEARING.

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DEMETRIOU & DEL GUERCIO,  
612 South Flower Street,  
Los Angeles, Calif. 90017,  
*Attorneys for Appellants.*

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Petitioners Adolph Weinberg and Etta Weinberg and petitioner corporations Sugar Daddy, Inc., *et al.*, pursuant to Rule 23 of Rules of the United States Court of Appeals for the Ninth Circuit, respectfully petition this Court for a rehearing in the above-entitled cause.

It is respectfully submitted that a rehearing should be granted on the following grounds:

First, generally that his Court, in affirming the decisions of the Tax Court on the ground that "the Tax Court was not clearly wrong," considered this cause as presenting for review, factual questions only, which required this Court to affirm the Tax Court decisions unless found to be "clearly erroneous," when such decisions were mixed questions of fact and law and conclusions of law and were predicated upon the interpretation and construction of writings, all of which questions, conclusions and interpretations are required to be reviewed

by this Court independently and without any presumption in favor of the Tax Court.

Next, specifically that this Court failed to apply the proper standard of appellate review by the application of the "clearly erroneous" rule to the decisions of the Tax Court that cash and not crops were transferred when such decisions were predicated upon (a) disregard and rejection of an express stipulation of ultimate fact, and (b) disregard of the notice of deficiency, each stating that farm crops were transferred. This Court should independently, and as a matter of law, interpret and construe the stipulation and notice of deficiency.

Next, specifically that this Court failed to apply the proper standard of appellate review by the application of the "clearly erroneous" rule to the decisions of the Tax Court that cash and not crops were transferred when such decisions constitute ultimate facts or a mixed finding of fact and conclusion of law, thus requiring appellate review to determine independently whether the probative or evidentiary facts justify as a matter of law the ultimate fact or conclusion of law.

Next, specifically that this Court failed to apply the proper standard of appellate review by the application of the "clearly erroneous" rule to the decisions of the Tax Court that cash and not crops were transferred when such decisions were induced by an erroneous concept of the law of the State of California governing the transfer of crops and when such decisions were induced by a misapprehension of the legal effect of the acts and utterances (oral and documentary) of petitioners, to wit: after finding that petitioners intended to transfer crops and that this was objectively mani-

fested, the Tax Court concluded that crops were not transferred because there was no tangible evidence of a transfer of crops. The rule of law to be applied by this Court is that transfers of farm crops are determined by the objectively manifested intention of the parties.

Next, specifically that this Court failed to apply the proper standard of appellate review by the application of the "clearly erroneous" rule to the decisions of the Tax Court that cash and not crops were transferred when such decisions rested primarily upon the interpretation of writings, to wit: the notice of deficiency, the written stipulation of facts the written minutes of the corporations, and the written notices of transfer of crops, each of which must be independently construed and interpreted.

That on the basis of the foregoing grounds, each and all, substantial legal issues were not considered by this Court and for these reasons petitioners respectfully request that a rehearing of this case be granted.

Respectfully submitted,

DEMETRIOU & DEL GUERCIO,  
*Attorneys for Appellants.*



### Certificate.

I certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for the purpose of delay.

RICHARD A. DEL GUERCIO.

